No. 78-733

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEWIS W. POE, PETITIONER

v.

PERCY D. MITCHELL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner brought this action in the United States District Court for the Southern District of Ohio seeking damages under 28 U.S.C. 1332 from respondent, an Air Force physician, for intentional mistreatment, invasion of privacy, and fraud in connection with his detention and psychiatric treatment on an Air Force base. The district court dismissed the complaint, holding (App. A, *infra*) that because petitioner was a member of the military, he could not recover dam-

ages for injuries sustained incident to his military service. The court found the rule of *Feres* v. *United States*, 340 U.S. 135 (1950)—barring suits calling into question the decisions of military officers because of the debilitating effect they would have on discipline and readiness—is applicable to damage actions brought against individual servicemen, as well as to claims against the government under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The court of appeals affirmed, quoting *Feres*, *supra*, 340 U.S. at 141 (Pet. App. A1-A2):

> We know of no American law which has ever permitted a soldier to recover for negligence, either against his superior officers or the Government he is serving.

Petitioner also brought a parallel action in the District of Hawaii against the United States under the Federal Tort Claims Act. The district court dismissed the case on the authority of *Feres*, the court of appeals affirmed, and this Court denied certiorari. *Poe* v. *United States*, No. 78-589 (Dec. 11, 1978).

Petitioner contends (Pet. 10-13) that review is warranted in the instant case because of a conflict among the circuits on the question whether the *Feres* doctrine bars malpractice suits brought by servicemen under state law against military physicians. Compare *Henderson* v. *Bluemink*, 511 F.2d 399 (D.C. Cir. 1974), with *Martinez* v. *Shrock*, 537 F. 2d 765 (3d Cir. 1976), cert. denied, 430 U.S. 920 (1977), and *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3d Cir. 1967). Although the decisions petitioner cites

are not in accord, the disputed issue was squarely presented by the petition in *Martinez* v. *Shrock*, *supra*, and this Court declined to review the case. See 430 U.S. 920-922 (White, J., dissenting from the denial of certiorari). There is no reason for a different disposition in the instant case. To the contrary, the issue is one of decreasing prospective importance because of the enactment of a statute, 10 U.S.C. 1089(a), providing that for causes of action accruing after October 8, 1976, an action against the United States is the sole remedy for injuries resulting from the negligent or wrongful acts of medical personnel in the Armed Forces.

Petitioner also urges (Pet. 10-16) that the courts below erred in concluding that the *Feres* doctrine is applicable in view of the allegations in his complaint that respondent was acting in bad faith and outside of the scope of his official duties. This contention is without merit. At the time of his hospitalization, petitioner was on active duty in the Air Force. Respondent is an Air Force physician who treated petitioner in an Air Force hospital. Like the medical malpractice claims in *Feres* itself (340 U.S. at 136-137), petitioner's claims against respondent clearly "ar[ose] out of or [were] in the course of activity incident to service." 340 U.S. at 146. Petitioner's recent petition in his Tort Claims Act case, No. 78-589, also presented his contention that *Feres* is inapplicable in view of his allegations of intentional misconduct and bad faith. This Court declined to review that contention in the latter case, and it should do the same here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed December 15, 1976]

Civil No. C-3-76-241

LEWIS W. POE, PLAINTIFF

v.

PERCY D. MITCHELL

ORDER

This matter is before the Court upon the motion of the defendant to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This is a diversity action brought under 28 U.S.C. § 1332 wherein plaintiff, formerly a captain in the United States Air Force, seeks to collect damages for the alleged intentional mistreatment, invasion of privacy, and fraud committed by the defendant, an Air Force psychiatrist.

The facts as gleaned from plaintiff's lengthy complaint are as follows. Late in 1973 plaintiff lodged several complaints against hospital personnel at Dover Air Force Base where he was stationed. On May 27, 1974 plaintiff was arrested by military police and was eventually transported to a psychiatric ward at Wright-Patterson Air Force Base in Dayton,

Ohio. When plaintiff refused any medication, he was forcibly restrained and given injections of Thorazine per the orders of defendant Major Mitchell. In a medical report dated June 27, 1974 Major Mitchell diagnosed plaintiff's condition as schizophrenia, paranoid type.

Had plaintiff been a civilian at the time of his allegedly unlawful treatment, his complaint may well state a valid claim. *Compare, Henderson* v. *Bluemink*, 511 F. 2d 399 (D.C. Cir. 1974) *with Estate of Burks* v. *Ross*, 438 F. 2d 230 (6th Cir. 1971). However, it is now a well-established rule of law that

> . . . members of the United States military service are immune from recovery, in suits brought by fellow members of the military service, for service-connected injuries caused by their negligent acts, either ministerial or discretionary in nature, performed in the line of duty.

Roach v. *Shields*, 371 F. Supp. 1392, 1393 (E.D. Pa. 1974); *see also Feres* v. *U.S.*, 340 U.S. 135 (1950); *Hass* v. *U.S.*, 518 F. 2d 1138, 1143 (4th Cir. 1975); *Tirrill* v. *McNamara*, 451 F. 2d 579 (9th Cir. 1971); *Bailey* v. *De Quevedo*, 375 F. 2d 72 (3rd Cir. 1967); *Kennedy* v. *Maginnis*, 393 F. Supp. 310 (D. Mass. 1975).

The above-stated rule of law has been extended to allegations of intentional wrongdoing. As was stated in *Rotko* v. *Abrams*, 455 F. 2d 992 (2d Cir. 1972), *aff'g* 338 F. Supp. 46 (D. Conn. 1971):

> The plaintiff's attempt to limit the *Feres* doctrine to negligence actions is rejected. The reasoning of the Supreme Court clearly indicates that it is the status of the claimant as a serviceman rather than the legal theory of his claim which governs in such cases. (citations omitted). 338 F. Supp. at 47.

See also Levin v. *U.S.*, 403 F. Supp. 99 (D. Mass. 1975).

Plaintiff's complaint indicates that the defendant was acting as a military doctor in a military hospital. Regardless of the nature of the treatment he administered to the plaintiff, he was clearly acting within the parameters of his line of duty. *See Adams* v. *Banks*, 407 F. Supp. 139 (E.D. Va. 1976).

Accordingly, defendant's motion to dismiss is hereby GRANTED.

IT IS SO ORDERED.

CARL B. RUBIN
/s/ Carl B. Rubin
United States District Judge

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